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No. 97-1497

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

KEN MIZUNO AND DOMINIC GENTILE,
Petitioners,

v.

DUKE SALISBURY, CHAPTER 11 TRUSTEE,
Respondent.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

BRIEF OF RESPONDENT IN OPPOSITION

JAMES J. FEDER
JOHN W. MILLS III
Counsel of Record
FEDER & MILLS
Professional Corporation
1901 Avenue of the Stars
Seventh Floor
Los Angeles, CA 90067
(310) 201-0737

Counsel for Respondent

QUESTION PRESENTED

Whether a remand for further factual findings on a jurisdictional issue precludes later litigation of that same jurisdictional issue.

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BRIEF OF RESPONDENT IN OPPOSITION

Respondent Duke Salisbury respectfully submits this brief in opposition to the petition for a writ of certiorari.

STATEMENT

I. Summary Of Argument

Petitioners Ken Mizuno and Dominic Gentile assert that this case turns on appellate finality. They are wrong. The simple question presented to this Court asks whether a party that heeds a district court's remand for further factual findings on a jurisdictional issue should be estopped from further litigation of that very same issue. Petitioners have failed to identify any split of authority or disagreement on the issue presented. Accordingly, the Petition should be denied.

II. Counterstatement Of Facts And Procedure

A. Facts

This case relates to one of the largest frauds ever perpetrated in the history of Japan. Between 1987-1990, Petitioner Ken Mizuno, individually and through various corporate entities, fraudulently oversold memberships to a golf country club in Japan. (Respondent's Appendix "Resp. App." at 3a, 12a.) While promising the prospective "members" that only 1,830 memberships would be sold, Mr. Mizuno sold over 52,000, netting him over $800 million in profits but leaving the victims with nothing but a piece of paper and a worthless "membership."[1] *Id.* at 3a-4a, 10a-12a.

From 1988 to 1991, Mr. Mizuno lived a grand lifestyle in Japan and abroad off the proceeds of his fraud, transferring in excess of $260 million into the United States alone. *Id.* at 4a, 12a. Mr. Mizuno, personally and through his wholly owned company Ken International Co., Ltd. ("KI"), spent lavishly in the United States purchasing, among other things, a Rolls-Royce Cornice, two golf courses, a $2 million-a-year personal golf "advisor," a DC-9 jet and the Beverly Hills mansion featured in the movie "Beverly Hills Cop 2." Mr. Mizuno also gambled extensively, paid the gambling debts of others, and transferred large sums of the fraudulent proceeds to friends and associates -- often in cash. *Id.*

In 1991, an investigative journalist in Japan revealed the true magnitude of the fraud. Immediately,

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[1] Had each "member" made a tee time to play at the Ibaraki Country Club, it would have taken many years to play even once.

Japanese authorities commenced parallel civil and criminal proceedings against Mr. Mizuno. *Id.* at 4a. The Japanese criminal proceedings ultimately resulted in Mr. Mizuno's conviction. The civil proceedings adjudicated Mr. Mizuno bankrupt as a result of his liability to his defrauded victims and placed Kengo Ohashi in charge of Mr. Mizuno's personal and business financial affairs.[2] *Id.* at 4a-5a, 13a. Mr. Ohashi effectively became the conservator of Mr. Mizuno's financial affairs.

Charged with gathering Mr. Mizuno's fraud proceeds and after obtaining express permission from the Japanese Court, Mr. Ohashi commenced separate bankruptcies in the United States on behalf of Mr. Mizuno personally and KI in an effort to obtain return of the fraud proceeds to the victims.[3] *Id.* at 5a, 14a. In 1992, before the United States Bankruptcy Court for the Central District of California, Mr. Mizuno challenged Mr. Ohashi's authority to initiate a bankruptcy case on his behalf. *Id.* Applying principles of comity, the bankruptcy court held that Japanese law vested Mr. Ohashi with control of Mr. Mizuno's personal financial affairs. *Id.* at 17a. As part of those affairs, the court held that Mr. Ohashi

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2 Petitioners assert that "under Japanese bankruptcy law, Mr. Ohashi's administrative authority was limited to property located in Japan." Petition at 1-2. This is an incorrect statement. Moreover, this issue was litigated and finally decided against Mr. Mizuno by the bankruptcy court in this matter.

3 The Japanese court had vested 100% control and ownership of the KI stock in Mr. Ohashi.

obtained the right to initiate a bankruptcy case. *Id.* That order is now final.[4]

Following the unsuccessful challenge to Mr. Ohashi's authority, Mr. Mizuno took no further action in the United States bankruptcy cases for over two years. *Id.* at 17a-18a. During that time, Mr. Ohashi administered both the Mizuno and KI bankruptcy estates in a normal manner. *Id.* Significant funds were returned to both estates through Mr. Ohashi's actions, including initiation of multiple adversary proceedings. *Id.* at 18a.

During that same time period, the United States Government began an investigation into the transfer of Mr. Mizuno's fraud proceeds into the United States through KI. *Id.* at 18a. This investigation ultimately resulted in federal charges of money laundering against both KI and Mr. Mizuno. *Id.* These charges carried with them the ability of the Government to seek forfeiture of all of the fraud proceeds to the United States Government and deny recovery to the victims. Seeking to preserve these funds for the benefit of the victims, Mr. Ohashi entered into discussions with the United States Department of Justice regarding the charges against KI. *Id.* As a result of these negotiations, and with the express permission of the Japanese court, the United States Bankruptcy Court and the United States District Court for the District of Nevada, Mr. Ohashi, as sole owner of KI, caused KI to plead guilty to the federal charges. *Id.* at 18a-19a. Under the terms of the Guilty Plea Memorandum

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[4] Mizuno attempted to appeal this decision over two years after entry. Both the district court and the United States Court of Appeals for the Ninth Circuit ruled it final and unreviewable.

("Memorandum"), certain defined KI assets in the United States were declared forfeit, certain expenses were deducted and 90% of the money was returned to Japan for distribution to the victims under the supervision of the Japanese courts.[5] *Id.* *See also United States v. Ken Int'l Co.*, 184 B.R. 102 (D. Nev. 1995).

Pursuant to the Memorandum and 21 U.S.C. § 853(n), on November 9, 1994, the Government gave notice of the proposed forfeiture requiring any party claiming an interest in the proceeds to come forward and file a petition asserting that interest. *Id.* at 19a. *See also* 21 U.S.C. § 853(n). Nearly a month later, Mr. Mizuno, by and through his attorney, Petitioner Dominic Gentile, filed a petition claiming personal ownership in seven pieces of property subject to forfeiture. Despite knowing full well of the pendency of the bankruptcy cases in California, Mr. Mizuno made no mention of the bankruptcy case in his petition and attempted to gain personal control over certain assets. *Id.* at 19a.

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5 Petitioners assert that the forfeited assets "were ultimately transferred by Ohashi to another Japanese corporate bankruptcy estate." Pet. at 3. This is not true. Under the direct supervision of the Japanese court, the United States Government returned the money to a corporation that merely acted as a conduit for the return of the funds to the victims.

B. Procedural History

1. The First Proceeding Before The Bankruptcy Court

It is well settled that upon commencement of a bankruptcy, "[a]ny interest the debtor has in property, no matter how insignificant, constitutes property of the estate." *In re Alcom Am. Corp.*, 154 B.R. 97, 103 (Bankr. D.D.C.), *vacated in part by*, 156 B.R. 873 (Bankr. D.D.C. 1993). Section 362 of the Bankruptcy Code prohibits and enjoins "any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate." 11 U.S.C. § 362(a)(3). By attempting to assert an individual proprietary interest in the forfeit proceeds (as well as filing the petition itself), Mr. Mizuno had interfered with property of his personal bankruptcy estate which Mr. Ohashi administered. Accordingly, Mr. Ohashi initiated an adversary proceeding against Petitioners for violation of the stay. Mr. Ohashi subsequently sought summary judgment.

Petitioners argued, *inter alia,* that Mr. Ohashi was not properly in control of the bankruptcy estate and, therefore, could not initiate the adversary proceeding. The bankruptcy court disagreed and, in an oral ruling followed by a brief order, entered summary judgment for Mr. Ohashi. Resp. App. at 7a. Petitioners appealed.

2. The First District Court Order

The district court reversed, largely on what it perceived to be an incomplete factual record that was

insufficient to establish that Mr. Ohashi could exercise the powers of the estate ("First Order"). The district court ruled as follows:

> (ii) The *record does not indicate* that Ohashi was appointed trustee of the bankruptcy estate pursuant to 11 U.S.C. §§ 321-323.
>
> No judgment of the Bankruptcy Court *in the record* contains a determination that the "Estate of Ken Mizuno," rather than Ken Mizuno, is the debtor in the underlying bankruptcy. *Absent findings by the court*, it cannot be said that the 7/10/92 and 10/7/92 orders denying motions to vacate the order for relief made such a determination.
>
> Applying by analogy traditional rules of issue preclusion, *when the content of a judgment is unclear*, only those determinations necessary to support a judgment are considered decided. Because the above mentioned orders can be construed as determinations that the commencement of the bankruptcy proceeding was proper, the court cannot say that they held Mr. Mizuno was not the debtor. . . .
>
> (5) *For the reasons discussed above*, the bankruptcy court's grants of summary judgment against Defendant Mizuno and partial summary judgment against Defendants Gentile and Reed, by orders entered 3/10/95 and 3/24/95, are REVERSED *and the above mentioned actions remanded.*

Pet. App. 17a-18a (emphasis added).[6] The First Order was explicit: the record on appeal was insufficient, in the district court's estimation, to conclude that Mr. Ohashi had standing. Accordingly, Mr. Ohashi returned to the bankruptcy court to seek determination of Mr. Ohashi's status -- the very act directed by the district court.

3. The Remand Proceeding Before The Bankruptcy Court

Mr. Ohashi amended the bankruptcy estate's complaint to clarify the basis for relief and sought summary judgment again before the bankruptcy court. Petitioners did not immediately oppose the motion. Rather, they instead returned to the district court and filed a motion seeking "clarification" of the First Order. In that request, Petitioners informed the district court of the further proceedings before the bankruptcy court and requested the district court's intervention in the form of an order terminating proceedings before the bankruptcy court. The district court declined, stating simply that the "order speaks for itself, and requires no further clarification."

Apparently unsatisfied with that result, Petitioners filed a second motion to withdraw the reference from the bankruptcy court. Again, the district court

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6 Notably, in the same order, the district court refused to withdraw the reference from the bankruptcy court. Had the district court's First Order conclusively resolved the standing issue as Petitioners now claim, it hardly seems appropriate for the district court to refuse to withdraw the reference and then remand the action.

declined and even commented on the theories of the amended complaint. In short, it is quite clear that the district court believed that it was remanding for further proceedings before the bankruptcy court and was satisfied that such proceedings were occurring.

After full briefing and submissions on the second motion for summary judgment, the bankruptcy court issued an unpublished eighty-six page opinion, replete with factual findings and legal conclusions regarding Mr. Ohashi's status. The bankruptcy court succinctly dealt with Mr. Mizuno's contention that the First Order had finally resolved the litigation: "I cannot agree with the fundamental premise of defendants' argument that [the First Order] conclusively determined the standing issue." Resp. App. at 38a. "[The district court] specifically denied defendants' request to amend the remand order to provide that this court may only take action to dismiss the adversary proceeding. The district court did so knowing that plaintiff had refiled the instant summary judgment motion. I interpret this to mean that the district court did not determine that plaintiff's standing was a legal impossibility." *Id.*

4. The Appeal To The District Court

Petitioners again appealed. They advanced two principal arguments. First, they contended that the First Order conclusively resolved the litigation and, therefore, the district court should not hear the matter at all. Second, Petitioners argued that the factual findings by the bankruptcy court were insufficient to confer standing. Consistent with its remand for further factual development in the First Order, in an unpublished minute order, the district court declined to rule that the issue had been conclusively addressed in

the First Order. The district court reversed on the merits, however, holding that even under the factual record presented, Mr. Ohashi lacked the power to initiate the proceedings at issue. Pet. App. at 15a. The district court remanded again, this time *with directions* to dismiss the action. *Id.*

5. Proceedings Before The Court Of Appeals

Mr. Ohashi timely appealed to the United States Court of Appeals for the Ninth Circuit.[7] Pet. App. at 1a-5a. Before the Ninth Circuit, Petitioners resurrected the same argument that had been rejected by both the district court and the bankruptcy court, namely that the First Order was intended to and did conclusively resolve the issue of Mr. Ohashi's standing and that Mr. Ohashi was estopped from returning to the bankruptcy court and developing the factual record. In an unpublished memorandum opinion, the Ninth Circuit held that the First Order did not bar further litigation of the issue of standing.[8] Pet. App. 3a. The Ninth Circuit also concluded that the bankruptcy court properly determined that Mr. Ohashi *did* have standing to initiate the adversary proceeding and, therefore, reversed the district court's order and reinstated the judgment of the bankruptcy court. Pet. App. at 5a.

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7 In light of the district court's order, Mr. Ohashi petitioned the bankruptcy court for appointment of a trustee. On December 15, 1995, the bankruptcy court granted the request and appointed Duke Salisbury as trustee. Mr. Salisbury also filed a timely notice of appeal.

8 The Ninth Circuit also held that Mr. Salisbury was the proper party to the appeal. Pet. App. at 2a.

The Petition followed.

REASONS FOR DENYING THE WRIT

I. Review Is Not Warranted Because The Decision Below Does Not Present The Conflict Identified By Petitioners

Contrary to Petitioners' claim, this case does not turn on appellate finality -- it turns, if at all, on the doctrine of collateral estoppel.[9] The facts are quite clear -- the district court desired further factual findings and record support regarding the issue of standing, and Mr. Ohashi followed the district court's direction and obtained that factual record. Petitioners

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9 Before the Ninth Circuit, Petitioners argued that the First Order precluded the remand under the doctrines of collateral estoppel (issue preclusion), *res judicata* (claim preclusion), law of the case and the rule of mandate. In the Petition, Petitioners now refer to *res judicata*. In essence, plaintiffs claim that the First Order completely and fully litigated the issue of Mr. Ohashi's standing with nothing left to consider. Where a party contends that an issue has been fully and fairly litigated thus precluding further consideration, the doctrine of issue preclusion is invoked. Claim preclusion is properly considered where the party argues that the issue could have been raised in prior litigation between the same parties over the same facts but was not and, therefore, it is barred. *See, e.g., Migra v. Warren City School Dist. Bd. of Educ.*, 465 U.S. 75, 77 n.1 (1984). Because this matter involves the same litigation and the same subject, the proper doctrine is actually law of the case which addresses the situation where later proceedings in the same case arguably diverge from earlier rulings. Between issue and claim preclusion, however, issue preclusion is arguably more on point.

now claim that the First Order should be interpreted in a manner inconsistent with the manner in which the district court, bankruptcy court and Ninth Circuit have all interpreted it. The real issue before this Court is whether the First Order should be given an effect never intended by the district court, thereby prejudicing the estate for expressly adhering to its dictates. Whatever the resolution of that issue on the merits (and Respondent would suggest the answer should be no), it is clear that the issue being litigated is the collateral effects of the First Order, not appellate jurisdiction, and, therefore, Petitioners' invocation of the "unsettled" nature of questions of appellate jurisdiction over district court orders reversing bankruptcy court orders is not squarely presented.

While couching it in different terms, in essence, Petitioners seek to invoke "issue preclusion" or "collateral estoppel" based upon Mr. Ohashi's adherence to the remand. "[A] right, question or fact distinctly put in issue and directly determined by a court of competent jurisdiction . . . cannot be disputed in a subsequent suit between the same parties or their privies." *Montana v. United States*, 440 U.S. 147, 153 (1979) (citation omitted). The purpose of precluding relitigation of identical issues is the promotion of judicial economy and giving effect to judgments where no further proceedings are contemplated. *See, e.g., Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 326 (1979). Notably, however, issue preclusion is an equitable doctrine "applied only when the alignment of the parties and the legal and factual issues raised warrant it." *Copeland v. Merrill Lynch & Co., Inc.* 47 F.3d 1415, 1423 (5th Cir. 1995) (citation omitted).

"'Redetermination of issues is warranted if there is reason to doubt the quality, extensiveness, or fairness

of procedures followed in prior litigation.'" *Kremer v. Chemical Constr. Corp.*, 456 U.S. 461, 481 (1982) (quoting *Montana v. United States,* 440 U.S. at 164 n.11). Based on this requirement that the prior litigation has conclusively addressed the issue, some courts have noted that the prior determination must be "final" but that term has been held not to be coextensive with the term "final," as it is used for appellate purposes. *See, e.g., John Morrell & Co. v. Local Union 304A*, 913 F.2d 544, 563 (8th Cir. 1990), *cert. denied*, 500 U.S. 905 (1991). Rather, the availability of appeal is but "one factor to consider" in determining whether the previous litigation of the issue was sufficient to accord preclusive effect. *Id.* Indeed, finality in the context of issue preclusion "may mean little more than that the litigation of a particular issue has reached such a stage that a court sees no really good reason for permitting it to be litigated again." *Lummus Co. v. Commonwealth Oil Ref. Co.*, 297 F.2d 80, 89 (2d Cir. 1961), *cert. denied*, 368 U.S. 986 (1962).

Petitioners assert that "the finality of the District Court's June 21, 1995 remand order for lack of subject matter jurisdiction is a dispositive issue." Pet. at 9. This is not true. Indeed, the "finality" in issue is not the notion of appellate finality but rather the finality necessary to estop further litigation of that particular issue. The "split" of the circuits to which plaintiffs refer regards appellate finality. While the issues inform one another, they are not identical.

Here, the district court clearly evidenced an intent to receive further factual information on the issue of standing. Appellate courts are well within their rights to remand to bankruptcy courts for further proceedings designed to make jurisdictional determinations and those remands do not preclude further determination of

the jurisdictional issues. *See United Elec. Radio Workers v. 163 Pheasant Street Corp.*, 987 F.2d 39, 47 n.16 (1st Cir. 1993) (noting that determination in first appeal that court lacked personal jurisdiction was simply "an assessment of the record *as it stood when the original motion to dismiss was filed.*") (emphasis in original).

Here, there is no question that the district court did not intend to end the litigation. First, after an opinion that pointedly refers to multiple factual deficiencies, the district court remanded without the direction to dismiss. Second, the district court refused to withdraw the reference from the bankruptcy court. Third, when specifically informed of further proceedings before the bankruptcy court following entry of the First Order, the district court refused to enter an order that would halt those proceedings. Fourth, the district court declined a second request to withdraw the reference and commented upon the active proceedings before the bankruptcy court. Finally, in its second opinion, the district court declined Petitioners' argument to simply reverse based upon collateral estoppel or law of the case. Only upon consideration of the record as it existed upon the second appeal did the district court conclude that Mr. Ohashi lacked standing as a matter of law.

The dichotomy between the record on the first appeal and the second appeal presents (and ultimately precludes) application of the doctrine of collateral estoppel. Rejecting a similar argument in the jurisdictional context, the court in *United Elec. Radio Workers* stated "the incomplete nature of the record prevented any sort of conclusive determination on the personal jurisdiction issue at the time [the preceding opinion] was handed down. The jurisdictional deficiency which informed the holding in our previous

opinion did not stem from either a settled factual predicate or legally insufficient allegations, but from perceived voids in the evidentiary landscape." *Id.* at 47. Here too, this case is an example of a district court observing "voids in the evidentiary landscape" and remanding for rectification. Appellate finality may inform, but does not decide, whether such an order is binding or the effect of such an order. It would work an extreme injustice to penalize the estate for providing the district court with the record it sought and would constitute an inequitable application of an equitable and discretionary doctrine.

While the issue was not directly presented, the same procedural scenario occurred before this Court in *Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. Partnership*, 507 U.S. 380 (1993). In *Pioneer Investment*, the bankruptcy court deemed the filing of a claim against an estate late and the "excusable neglect" standard not met. *Id.* at 384-85. The district court disagreed concluding that the proper rule would follow "a more liberal approach" to the "excusable neglect" standard. *Id.* at 385. The district court remanded for further consideration of the issue. The litigants returned to the bankruptcy court whereupon they continued to litigate the nature of the reasons behind the late filing. The bankruptcy court again concluded that the late claim would not be accepted and the district court affirmed. The court of appeals reversed and this Court accepted certiorari and affirmed, thus establishing the standard by which "excusable neglect" would be adjudicated. While *Pioneer Investment* did not directly consider the issue of claim or issue preclusion, it demonstrates the benefits of heeding the district court remand. It further presented a situation where the district court considered the same legal issue twice, once after a remand for further factual findings. In that case, the parties were able to establish a factual

record under which the conduct would be adjudicated. No court ruled that the first district court order precluded further litigation of the standard simply because the parties heeded the remand. Nor should the Court here.

Petitioners rely predominantly on this Court's decision in *Federated Department Stores, Inc. v. Moitie*, 452 U.S. 394 (1981). That case presented issues significantly different from those posed by this action. In *Federated Department Stores*, the plaintiffs lost before the trial court. A number of the plaintiffs appealed but some did not. The plaintiffs that did appeal prevailed before the Ninth Circuit. The plaintiffs that had elected not to appeal attempted to file a new action after the appeal had been resolved favorably. The defendant argued that the prior disposition was *res judicata* against those who did not appeal and that the claim had been precluded by the former final and unappealed decision. This Court ultimately agreed. Noting that the parties who had failed to appeal "seek to be the windfall beneficiaries of an appellate reversal procured by other independent parties," this Court held that where a party "made a calculated choice to forgo their appeals," they could not later revive their case through the fortuitous event occasioned by the acts of a third party. *Id.* at 400-01.

Federated Department Stores differs from this matter in many respects. Far from attempting to gain the windfall of a fortuitous event after having ceased litigation, the estate simply heeded the instructions of the district court to provide the record necessary to make a conclusive determination with respect to standing. Moreover, *Federated Department Stores* involved claim preclusion, a related but distinct doctrine from the issue preclusion at stake here. Additionally, in *Federated Department Stores* the

second action was a later filed complaint. Here, the estate continued to litigate the same action before the same courts to the prejudice of no one. None of the factors that motivated this Court's decision in *Federated Department Stores* are present here.

II. Review Is Not Warranted Because Petitioners Have Not Identified A Split Of Authority Over The Issue At Stake

Even assuming that appellate finality is at issue, and for the reasons discussed above it is not, none of the cases cited by Petitioners establish the purported "split" in authority under the unique facts presented by this case. The cases cited by petitioner are circuit court decisions deciding whether appellate jurisdiction lies for review of a district court order remanding a bankruptcy court decision. In *each* case, the court of appeals considers whether jurisdiction lies. In the case at bar, there is no appellate jurisdictional question presented. At the very most, the court of appeals considered whether the discretionary doctrine of collateral estoppel should bar reconsideration of the issue of standing. Thus, because the matter stands in a procedural posture different from the purported "split" identified by Petitioners, review is inappropriate.

Moreover, none of these cases presented a situation like that at bar where the district court remands for further factual development *of the issue before it*. It may present an interesting question whether a decision on a point of law and remand for further proceedings in the case is "final" for appellate purposes where that issue would not be reconsidered, but here the district court essentially held that it could not decide the question before it on the record submitted. In other words, the remand was not for the purpose of further proceedings on separate and distinct issues but rather

for further proceedings *on the very issue presented in the first appeal* -- the same procedure followed in *Pioneer Investment.*

III. Review Is Not Warranted Because The Authorities Cited By Petitioner Would All Yield The Same Result

As stated above, appellate finality is not the dispositive issue in this case. Even if it were, however, resolution of the purported "split" in authorities would not alter the outcome of this matter.

As Petitioners correctly recognize, a "split" among the circuits exists as to when a court of appeals has jurisdiction to entertain an appeal from a district court order reversing and remanding a bankruptcy court order for further proceedings. The majority rule, announced by the United States Court of Appeals for the Seventh Circuit, holds that even if the bankruptcy court order is final, a district court order reversing and remanding for further significant proceedings, such as fact finding on the central issue of the appeal, is not final for appellate purposes. *See Suburban Bank of Cary Grove v. Riggsby (In re Riggsby)*, 745 F.2d 1153 (7th Cir. 1984). That rule has been repeated by the Seventh Circuit, *see, e.g., In re Lopez*, 116 F.3d 1191 (7th Cir.), *cert. denied,* 118 S. Ct. 599 (1997), and followed by most circuits. *See, e.g., Estancias La Ponderosa Dev. Corp. v. Harrington (In re Harrington)*, 992 F.2d 3 (1st Cir. 1993); *LTV Corp. v. Farragher (In re Chateaugay Corp.),* 838 F.2d 59 (2d Cir. 1988); *United States v. Carolina Parachute Corp.*, 907 F.2d 1469, 1472 n.3 (4th Cir. 1990); *Aegis Specialty Mktg., Inc. v. Ferlita, (In re Aegis Specialty Marketing, Inc.)*, 68 F.3d 919, 921 (5th Cir. 1995); *Broken Bow Ranch, Inc. v. Farmers Home Admin.(In re Broken Bow Ranch, Inc.)*, 33 F.3d 1005, 1008 (8th

Cir. 1994); *Masunaga v. Stoltenberg (In re Rex Montis Silver Co.)*, 87 F.3d 435, 438 (10th Cir. 1996); *Jove Eng'g, Inc. v. IRS*, 92 F.3d 1539, 1548 (11th Cir. 1996); *In re St. Charles Preservation Investors, Ltd.*, 916 F.2d 727 (D.C. Cir. 1990) (per curiam). Three circuits follow a more lenient rule. In the Third, Ninth and arguably Sixth Circuits, the courts have held that other considerations such as judicial economy and expedition may make otherwise non-final orders final and amenable to appellate review. *See, e.g., Hammond v. Commonwealth Mortgage Corp. of America (In re Hammond)*, 27 F.3d 52, 55 n.5 (3d Cir. 1994); *Dominguez v. Miller (In re Dominguez)*, 51 F.3d 1502, 1506-07 (9th Cir. 1995); *Breyfogle v. Grange Mut. Cas. Co. (In re Gardner)*, 810 F.2d 87, 92 (6th Cir. 1987); *but see Miller's Cove Energy Co., Inc. v. Moore (In re Miller's Cove Energy Co.)*, 128 F.3d 449, 451 (6th Cir. 1997) (questioning viability of *Gardner* and dismissing appeal where certification under Rule 54(b) had not been sought).

Petitioners do not dispute that the majority rule would find the First Order incapable of preclusive effects -- the district court clearly contemplated further significant proceedings before the bankruptcy court. What Petitioners ignore, however, is that the Ninth Circuit -- the appellate court in this matter -- subscribes to the *minority* position. Before the Ninth Circuit, Respondent (and Mr. Ohashi as amicus) addressed the "finality" of the order under the more lenient, judicial efficiency test adopted by the minority of Circuits. Nevertheless, the Ninth Circuit concluded that the First Order was not final even under that more lenient standard. [cite] Thus, this case does not present an opportunity to resolve the conflict among the circuits, because the result would be the same under either approach. In reality, Petitioners seek review of the question whether the court of appeal correctly applied

its lenient test for appealability on the particular fact of this case, but that fact-bound question is not worthy of this Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

JAMES J. FEDER
JOHN W. MILLS III
Counsel of Record
FEDER & MILLS
Professional Corporation
1901 Avenue of the Stars
Seventh Floor
Los Angeles, CA 90067
(310) 201-0737

Counsel for Respondent

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